

1987

Gail Kathleen Throckmorton v. Cecil Dee Throckmorton : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS, STATE OF UTAH

DOCKET NO. 870400-CA

GAIL KATHLEEN THROCKMORTON,

:

Plaintiff/Respondent,

:

vs.

:

Case No. 870400-CA
Category 14b

CECIL DEE THROCKMORTON,

:

Defendant/Appellant.

:

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH
The Honorable Homer F. Wilkinson, Presiding

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NOV 27 1987

COURT OF APPEALS

GAIL KATHLEEN THROCKMORTON,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 870400-CA
		Category 14b
CECIL DEE THROCKMORTON,	:	
Defendant/Appellant.	:	

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH
The Honorable Homer F. Wilkinson, Presiding

NOLAN J. OLSEN
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IN THE COURT OF APPEALS, STATE OF UTAH

GAIL KATHLEEN THROCKMORTON,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 870400-CA
	:	Category 14b
CECIL DEE THROCKMORTON,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction over this appeal pursuant to U.C.A. §78-2a-3(2)(g). Defendant/appellant appeals the Memorandum Decision of the District Court entered July 30, 1987 modifying the Decree of Divorce entered in the Third District Court September 30, 1976.

ISSUES PRESENTED FOR REVIEW

1. Did plaintiff meet her burden in establishing a substantial and permanent change of circumstances sufficient to justify the trial court's modification of the Divorce Decree?

2. Did the trial court adequately consider the Paffel criteria prior to awarding plaintiff alimony?

3. Did the trial court abuse its discretion when it awarded plaintiff alimony in light of the equities of this case?

STATEMENT OF FACTS

1. The parties were married on or about on May 27, 1955. During the course of the marriage eight children were born as issue of this couple. The youngest child was born March 26, 1968. (R.2)

2. Plaintiff filed for divorce on August 11, 1976. (R.2) Defendant signed an acceptance of service and consent to default. (R.9)

3. On September 13, 1976 the court entered a Finding of Fact and Conclusions of Law and Decree of Divorce. (R.9-15)

4. The Decree of Divorce provided that defendant pay \$85.00 per month as child support for a total of \$425.00 per month for the support and maintenance of the minor children. (R.10, 11)

5. The Decree awarded plaintiff \$1.00 per year as alimony. (R.10, 11)

6. The Decree awarded plaintiff the parties home subject to the mortgage payments, all the household furnishings and fixtures. (R.10,11) Plaintiff realized a gain of \$24,000 in equity on the home when it was sold in 1983. (TR.5) (R.15-16)

7. Defendant was ordered to pay all obligations to creditors the parties incurred during the course of the marriage. (R.11) The total amount of marital debts was \$12,000. (R.82)

8. At the time of the divorce defendant was employed as a police officer with Salt Lake City. Defendant made \$19,040 in 1976. (TR. 20)

9. Plaintiff was unemployed at the time of the divorce. (R.136)

10. Plaintiff filed a petition to modify on January 7, 1980. The petition sought an increase in child support to \$150 per child and an increase in alimony to \$150 per month. (R.17-18)

11. On May 13, 1980, the court made Findings of Fact and Conclusions of Law denying plaintiff an increase in alimony because plaintiff failed to demonstrate a change in circumstances sufficient to warrant an increase in alimony. (R.54)

12. At the time of modification defendant made approximately \$23,500 annually and plaintiff made \$690.92. (R.53-54)

13. Plaintiff again filed a petition to modify the Decree of Divorce on September 26, 1986. (R.60-61) The petition alleges as a change of circumstances. Plaintiff alleged medical problems prevented her from working. (R.136) At the time the petition to modify was filed defendant had retired and had a gross annual income of \$18,970.00. (R.129)

STATEMENT OF PROCEEDINGS BELOW

1. On September 30, 1986, plaintiff filed a petition to modify the Decree of Divorce previously entered on August

11, 1976. The petition sought a share of defendant's retirement and an increase in alimony from \$1 to \$500 per month. (R.66-68)

2. Defendant answered and filed a motion for summary judgment with memorandum of law addressing all issues. (R.79-118)

3. Plaintiff responded to defendant's motion for summary judgment. (R.121-125)

4. This matter came on for hearing on July 16, 1987, before the Honorable Homer F. Wilkinson. (R.127) Both parties were present and represented by counsel. The Court took the matter under advisement.

5. On July 30, 1987, the Court issued a Memorandum Decision denying plaintiff's request for a share of defendant's retirement and granting plaintiff's request for increased alimony. Alimony was increased to \$396.00 per month. (R.128-130)

6. Defendant appeals the Court's Memorandum Decision and the Findings of Fact and Conclusions of Law awarding plaintiff increased alimony. (R.133-134)

SUMMARY OF ARGUMENT

The trial court abused its discretion when it found that there was a substantial and permanent change in circumstances for the parties when defendant's income substantially decreased from the time of divorce until the

time of modification ten years later and plaintiff was unemployed at the time of divorce and at the time of modification. Moreover, plaintiff provided insufficient evidence to establish that her medical problems permanently prevent her from obtaining employment. Plaintiff's petition to modify should have been dismissed for failure to prove substantial and permanent change in circumstances.

The trial court award of alimony of \$396.00 per month is unsupported by the evidence because the Court failed to consider the Paffel criteria prior to awarding plaintiff alimony. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986). Specifically, the Court failed to adequately consider plaintiff's ability to provide for herself and defendant's ability to pay. In the event this Court finds that there has been a substantial change in circumstances, the case should be remanded for specific findings under Paffel.

Finally, the trial court abused its equitable discretion in awarding plaintiff alimony in light of the divorce decree which awarded plaintiff \$24,000 equity in the home and required defendant to pay \$12,000 in marital debts. Additionally, the parties have lived separate lives for ten years and defendant has remarried, retired, and is living on less income than when the parties divorced. The trial court failed to adequately consider all the equities of this case when it awarded plaintiff alimony.

ARGUMENT

POINT I

PLAINTIFF FAILED TO ESTABLISH A SUBSTANTIAL AND PERMANENT CHANGE IN CIRCUMSTANCES JUSTIFYING REOPENING THE DIVORCE DECREE.

A party seeking a modification of a divorce decree must demonstrate to the Court below that a substantial change in circumstances had occurred since the entry of the decree. Thompson v. Thompson, 709 P.2d 360, 362 (Utah 1985). The change in circumstances must also be permanent before the court can reopen the divorce decree. Keisel v. Keisel, 619 P.2d 1374, 1376 (Utah 1980).

A party appealing a modification of a divorce decree must demonstrate that the evidence clearly preponderates against a finding of substantial change of circumstances or that the trial court has abused its discretion. Thompson at 362.

In the case at hand the trial court abused its discretion because there has been neither a permanent nor a substantial change in circumstances since the divorce decree was entered. When the divorce decree was entered in 1976, the plaintiff was unemployed and the defendant was employed as a police officer making \$19,040 per year. At the time of the modification was filed in 1986, plaintiff was unemployed and defendant had remarried and retired on an income of \$18,970 per year. Since the Supreme Court determined that the effects of inflation can be taken into account when determining

whether there has been a change in circumstances, Wiker v. Wiker, 600 P.2d 514,515 (Utah 1978), and when taking into account the effects of inflation from 1976 to 1986, defendant's income has substantially decreased.

In determining whether there has been a change in circumstances, the Court also considered the plaintiff's medical condition. (R.136) Specifically the Court found that "plaintiff is unemployed now and is unable to obtain gainful employment due to medical problems." (R.136)

Defendant respectfully submits that there is insufficient evidence in the record to establish that plaintiff's medical condition constitutes a substantial and permanent change in circumstances to justify modification. The only evidence of medical conditions is a proffer of her testimony as to the nature of her condition. (TR. 6, lines 14-22) There is no evidence whatsoever to establish that the medical problems cannot be corrected with treatment or that they are permanent or that they permanently prevent plaintiff from obtaining gainful employment.

The record thus indicates that there is no testimony as to why the plaintiff's afflictions make it impossible for her to obtain employment. In fact, the plaintiff has been unable to obtain employment as supervisor of Clerks at the District Court in Las Vegas. (TR. 36, lines 4-10) Moreover, defendant has remarried and his income has decreased since the

divorce while plaintiff's income remained substantially the same. As such the plaintiff failed to establish a substantial and permanent change in circumstances. The Court abused its discretion when it found that plaintiff established a substantial and permanent change in circumstances. Based upon defendant's decreased income, plaintiff's case should be dismissed.

POINT II

THE TRIAL COURT FAILED TO MAKE ADEQUATE FINDINGS OF FACT UNDER PAFFEL TO SUPPORT AN AWARD OF ALIMONY.

The Utah Supreme Court recently set forth what factors must be considered by the trial court when it awards alimony. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986). Specifically these factors are, (1) the financial conditions and needs of the spouse claiming support, (2) the ability of that spouse to provide sufficient income for him or herself, and (3) the ability of the responding spouse to provide the support.

Regarding findings of fact in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987) the Court stated:

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are clear, uncontroverted and capable of supporting only a finding in favor of the judgment.

Acton at 999.

The failure of the trial court to make specific findings was recently considered by this court in the case of Marchant v. Marchant, 66 Utah Adv. Rep. 45 (Utah App. 1987).

In Marchant, the trial court in Finding 8 disallowed alimony without explanation. In Finding 10 the Court set forth the monthly income of the parties. As this Court held, the findings were insufficient to establish plaintiff's financial conditions and needs, her ability to provide sufficient income for those needs and defendant's ability to provide support. Id. at 49-50.

Applying Marchant to this case supports the conclusions that the findings are insufficient to support an award of alimony. The relevant findings are Findings 7 and 8. Finding 7 states that the plaintiff is unemployed and is unable to obtain gainful employment because of medical problems. Finding 8 indicates that defendant has a gross income of \$1584 per month. Unlike Marchant and Paffel, there was no testimony as to plaintiff's or defendant's monthly expenses.

As previously discussed in Point I, defendant objects to Finding 7 as being unsupported by the evidence. Additionally, Finding 7 fails to address plaintiff's needs. Finding 8 states defendant's gross income but fails to indicate whether the Court considered defendant's ability to pay. In summary there is little or nothing in the record to support an award of \$396.00 per month as alimony. The Court specifically failed to address the Paffel factors in reaching its decision on alimony.

As required by Paffel and Marchant, this case should be remanded for specific consideration of the Paffel factors and to consider such additional evidence as is necessary for a proper determination. An issue that specifically needs to be addressed is the effect on alimony and equities between the parties of plaintiff's receipt of \$24,000 in 1983 from the sale of the home.

POINT III

THE TRIAL COURT ABUSED ITS EQUITABLE DISCRETION IN AWARDING PLAINTIFF ALIMONY.

The decision of the Court in awarding alimony is based upon principles of public policy and equity. The overriding public policy concern is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." Eames v. Eames, 735 P.2d 395, 397 (Utah App. 1987), citing Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

The analysis does not stop here however. Modification of a decree to provide for alimony is an equitable matter. The Supreme Court implicitly recognized this in Paffel when the Court indicated that the financial condition of the receiving spouse and the ability to pay of the paying spouse are at issue. Additionally, as in any equitable proceeding, equitable maxims assist in determining an equitable outcome. With these factors in mind, the equities of this case weigh against an award of alimony.

The original divorce decree awarded plaintiff inter alia, the home, and the defendant was ordered to pay \$500 in child support and to pay the bills of the marital estate.

The defendant paid over \$12,000 in bills and diligently paid child support when due. In 1983, plaintiff sold the home realizing a \$24,000 cash gain from the sale. Defendant remarried, purchased a trailer and retired in 1983.

Now the plaintiff comes to Court seeking permanent alimony after the parties have lived apart for ten years. Although unclear from the record, shortly after receiving the \$24,000 on the home, plaintiff quit her job as supervisor of Clerks at the District Court in Las Vegas and has apparently spent the \$24,000. Defendant continued working until eligible for retirement.

It is now inequitable for the plaintiff to seek more money from the defendant due to her own lack of frugality and diligence in managing her financial affairs by awarding plaintiff alimony. The trial court is now punishing defendant for his own conservative financial management and rewarding plaintiff for her lack thereof.

Defendant respectfully submits that at some point after the couple has been divorced and the children are grown, in this case ten years after divorce, equity requires a finality or at least a cap on the financial ties created by the divorce. Upon retirement defendant should be entitled to

some predictability in his financial matters. Defendant has taken care of his children, remarried and moved on with his life. He is making less money now than he made when the parties were divorced ten years ago. Under these facts the trial court abused its equitable discretion in reopening this divorce decree and awarding plaintiff alimony.

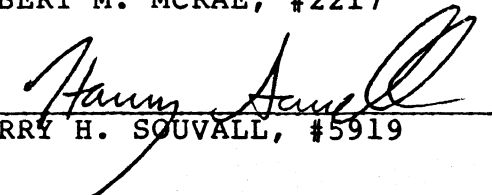
CONCLUSION

For the above cited reasons, defendant respectfully requests that the Court dismiss plaintiff's petition. In the alternative, defendant requests that this matter be remanded to the District Court for further consideration of the Paffel criteria.

DATED this 24 day of November, 1987.

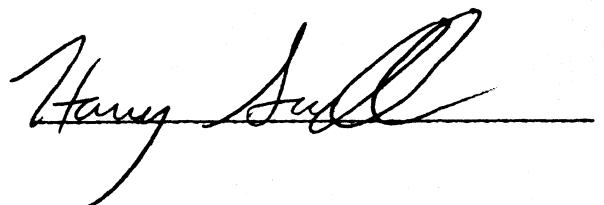
McRAE & DeLAND


ROBERT M. McRAE, #2217


HARRY H. SOUVALL, #5919

CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, four (4) true and correct copies of the foregoing Brief of Appellant to Nolan J. Olsen, Attorney for Plaintiff/ Respondent, 8138 South State Street, Midvale, Utah 84047 on this 24th day of November, 1987.



AUG 03 1987
MCHAE & DeLIND

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GAIL KATHLEEN THROCKMORTON,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. D-23347
vs.	:	
CECIL DEE THROCKMORTON,	:	
Defendant.	:	

This matter comes before the Court on plaintiff's Petition, filed on the 30th day of September, 1986, to modify a divorce Decree entered on the 13th day of September, 1976. The plaintiff requests: (1) that she be awarded fifty percent of the defendant's retirement that was accrued during the marriage, being from May 27, 1955 to September 13, 1976, and was not addressed in the divorce Decree; (2) in the alternative, for an increase in alimony based on a change of circumstance. The Court finds:

1. That plaintiff knew of the retirement account at the time of the divorce, and failed to bring it before the Court.

2. That even if the plaintiff didn't realize she could receive a share of it at the time of the divorce, she failed to raise it in 1980 at the time of a modification hearing, and waited until 1986, that being over ten years.

3. That plaintiff was not employed at the time of the original Decree, but was capable of working and earning money.

4. That plaintiff was employed in 1980 at the time of a modification hearing.

5. That the parties' children have all reached their majority, and the defendant is no longer paying child support.

6. That plaintiff and defendant were married for 21 years, and the plaintiff was awarded \$1.00 per year alimony, but no appreciable amount of alimony has been paid to her.

7. That plaintiff is not employed now, and is unable to obtain gainful employment because of medical problems.

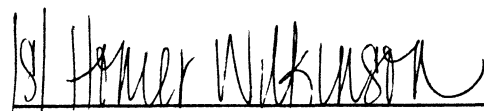
8. That defendant has retirement income of \$18,970.00 per year, or \$1,584.00 per month.

Based on the foregoing, the Court concludes and Orders:

1. That plaintiff's request to modify the Decree of Divorce and award her a share of the defendant's retirement account be denied on the grounds of res adjudicata and collateral estoppel.

2. The Court does find there has been a change of circumstances, and Orders the defendant to pay to the plaintiff the sum of \$396.00 per month as alimony.

Dated this 30 day of July, 1987.


HOMER F. WILKINSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this _____ day of July, 1987:

Nolan J. Olsen
Attorney for Plaintiff
8138 S. State Street
Midvale, Utah 84047

Robert M. McRae
Attorney for Defendant
209 East 100 North
Vernal, Utah 84078

Nolan J. Olsen (2464)
OLSEN & OLSEN
Attorneys for Plaintiff
8138 South State Street
Midvale, Utah 84047-3299
Telephone: (801) 255-7176

SEP 14 1987
MCRAE & DEL AND

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

GAIL KATHLEEN THROCKMORTON
Plaintiff

vs.

CECIL DEE THROCKMORTON
Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. D-23347

JUDGE HOMER F. WILKINSON

Plaintiff's Petition to Modify Decree of Divorce having come on to be heard before the Honorable Homer F. Wilkinson on the 21 day of May 1987, the plaintiff appearing in person and by her attorney Nolan J. Olsen, and the defendant appearing in person and by his attorney Robert M. Mcrae, and the plaintiff and the defendant having proffered evidence to the court, and the plaintiff having testified, and the court being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That plaintiff requested that she be awarded fifty percent (50%) of defendant's retirement at Utah State Retirement for the period of May 27, 1955 to September 12, 1976, the date of the Decree of Divorce, which retirement was not addressed in the Decree of Divorce, or, in the alternative, for an increase in alimony, based upon a change of circumstances.
2. The court finds that plaintiff knew of the retirement account at the time of the divorce, and failed to bring it before the court.
3. That plaintiff testified that she did not realize she was entitled to receive a share of said retirement at the time of the divorce

and, likewise, she did not realize she had a right at the time in 1980, when she requested a modification for child support, and that she waited until the 30th day of September 1986, a period of ten years, prior to commencing the modification hearing requesting an award of a portion of the retirement, based upon her years of marriage.

4. That plaintiff was not employed at the time of the original Decree of Divorce, had eight children, and was incapable of working and earning money.

5. That plaintiff was employed in 1980, at the time of the modification hearing.

6. That all eight children have now reached majority, and defendant is paying no child support to the plaintiff.

7. That plaintiff and defendant were married for 21 years, and plaintiff was awarded \$1 per year as alimony by way of the Decree of Divorce and no other alimony has been paid to her.

8. That the plaintiff is not now employed, and is unable to obtain gainful employment because of medical problems.

9. That defendant has retirement income of \$18,900 per year, or \$1,584 per month.

Based upon the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. That plaintiff's request to modify the Decree of Divorce and award to her a share of the defendant's retirement account be denied upon the grounds of res judicata and collateral estoppel.

2. The court finds there has been a substantial change of circumstances, and orders defendant to pay to plaintiff the sum of \$396 per month as alimony, commencing in August 1987.

Dated this 15 day of September 1987.

BY THE COURT:

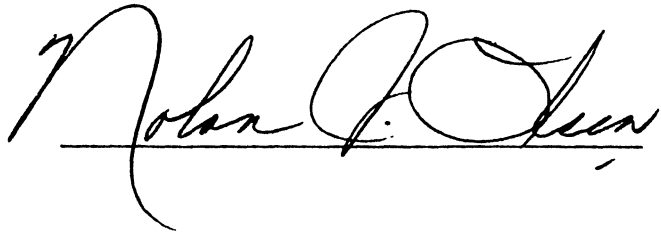


HOMER F. WILKINSON, Judge

MAILING CERTIFICATE

This is to certify that on this 10 day of September 1987, I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, postage prepaid, to:

ROBERT M. McRAE
Attorney for Defendant
209 East 100 North
Vernal, Utah 84078

A handwritten signature in cursive script, reading "Nolan P. Olsen", is written over a horizontal line.

Nolan J. Olsen (2464)
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8138 South State Street
Midvale, Utah 84047-3299
Telephone: (801) 255-7176

SEP 14 1987
HOMER F. WILKINSON

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

GAIL KATHLEEN THROCKMORTON
Plaintiff

vs.

CECIL DEE THROCKMORTON
Defendant

ORDER MODIFYING
DECREE OF DIVORCE

Case No. D-23347

JUDGE HOMER F. WILKINSON

Plaintiff's Petition to Modify Decree of Divorce having come on to be heard before the Honorable Homer F. Wilkinson on the 21 day of May 1987, the plaintiff appearing in person and by her attorney Nolan J. Olsen, and the defendant appearing in person and by his attorney Robert M. McRae, and the plaintiff and the defendant having proffered evidence to the court, and the plaintiff having testified, and the court being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and upon motion of Nolan J. Olsen, attorney for the plaintiff,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff's request to modify the Decree of Divorce and award plaintiff a share of defendant's retirement at Utah State Retirement Fund be, and the same is hereby denied, upon the ground of res judicata and collateral estoppel.
2. That defendant be, and he is hereby ordered to pay to plaintiff the sum of \$396 per month as alimony, commencing in August 1987.

Dated this 15 day of September 1987.

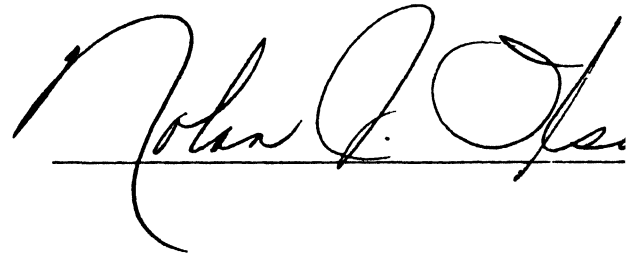
BY THE COURT:

151
HOMER F. WILKINSON, Judge

MAILING CERTIFICATE

This is to certify that on this 10 day of September 1987, I mailed a true and correct copy of the foregoing Order Modifying Decree of Divorce, postate prepaid, to:

ROBERT M. McRAE
Attorney for Defendant
209 East 100 North
Vernal, Utah 84078

A handwritten signature in black ink, appearing to read "Robert M. McRAE", is written over a horizontal line. The signature is stylized with large, flowing loops.